No. 03-1404

In the Supreme Court of the United States

GARY L. BASS, CHIEF OF OPERATIONS OF OFFENDER MANAGEMENT SERVICES, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL., PETITIONERS

v.

IRA W. MADISON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record

STUART E. SCHIFFER
Acting Assistant Attorney General

MARK B. STERN
MICHAEL S. RAAB
CATHERINE Y. HANCOCK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the institutionalized-persons provisions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc-1, are valid under the Establishment Clause of the First Amendment.

2. Whether the institutionalized-persons provisions of RLUIPA are a valid exercise of Congress's Spending Clause or Commerce Clause power.

3. Whether an action lies under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to enforce the institutionalized-persons provisions of RLUIPA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 03-1404

GARY L. BASS, CHIEF OF OPERATIONS OF OFFENDER MANAGEMENT SERVICES, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL., PETITIONERS

v.

IRA W. MADISON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 355 F.3d 310. The opinion (Pet. App. 23-54) of the district court is reported at 240 F. Supp. 2d 566.

JURISDICTION

The court of appeals entered its judgment on December 8, 2003. On February 25, 2004, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including April 6, 2004, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States intervened in this litigation to defend the constitutionality of the institutionalized-persons provisions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C.

2000cc-1. The court of appeals sustained that law against the petitioners' Establishment Clause challenge and remanded the case for consideration, *inter alia*, of petitioners' other constitutional challenges to the law. For the reasons explained below, the United States respectfully suggests that the petition for a writ of certiorari should be granted limited to the first question presented, and that certiorari should be denied for the remaining questions.

1. RLUIPA is a civil rights law designed to provide, in certain circumstances, statutory protection for the free exercise of religion and to prevent religious discrimination. At the time of RLUIPA's enactment, evidence before Congress demonstrated that, in the absence of federal legislation, prisoners, detainees, and individuals institutionalized in mental hospitals faced substantial and unwarranted burdens in freely practicing their religious faiths. See, *e.g.*, H.R. Rep. No. 219, 106th Cong., 1st Sess. 9-10 (1999) (summarizing testimony). Based on the evidence it compiled, Congress concluded that the rights of institutionalized persons to practice their faith often were burdened by "frivolous or arbitrary rules," and that, whether for reasons of "indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." Joint Stmn. of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000, 146 Cong. Rec. S7775 (daily ed. July 27, 2000).

Congress responded by enacting Section 3 of RLUIPA to provide institutionalized persons protection from unnecessary burdens on religious practice.

42 U.S.C. 2000cc-1.[1] Section 3(a) provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden "is in furtherance of a compelling governmental interest," and "is the least restrictive means" of furthering that interest. 42 U.S.C. 2000cc-1(a).[2] RLUIPA defines the "government" to which it applies as "a State, county, municipality, or other governmental entity created under the authority of a State," and "any branch, department, agency, instrumentality, or official of [such] an entity." 42 U.S.C. 2000cc-5(4).[3]

Invoking its power under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, Congress has required compliance with Section 3(a) whenever "the substantial burden [on religion] is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C.

---

[1] Section 2 of the statute, 42 U.S.C. 2000cc, protects persons and entities against land-use regulations that burden religious exercise or discriminate on the basis of religion. That portion of RLUIPA is not at issue in this suit.

[2] 42 U.S.C. 2000cc-1(a) provides in full:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> > (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

[3] Through the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, Congress has imposed a much broader obligation on the federal government to justify substantial burdens on religion imposed by any federal governmental activity—not just zoning or institutionalization.

2000cc-1(b)(1). Congress also exercised its Commerce Clause power, U.S. Const. Art. I, § 8, Cl. 3, as an independent constitutional basis for Section 3 in those cases where "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. 2000cc-1(b)(2). However, even if a plaintiff demonstrates the requisite effect on commerce, RLUIPA's provisions do not apply if the defendant demonstrates, as an affirmative defense, that the type of burden at issue, in the aggregate, would not have a substantial effect on commerce. 42 U.S.C. 2000cc-2(g).[4]

RLUIPA creates a private right of action, which allows any individual whose exercise of religion has been substantially burdened to "assert a violation of this chapter as a claim or defense in a judicial proceeding" and to obtain "appropriate relief against a government." 42 U.S.C. 2000cc-2(a). The United States also may seek injunctive or declaratory relief to enforce the statute. 42 U.S.C. 2000cc-2(f).

2. Respondent Ira Madison is an inmate incarcerated in a Virginia correctional facility who professes

---

[4] 42 U.S.C. 2000cc-2(g) provides:

> If the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

to subscribe to the "Hebrew Israelites" faith. As relevant here, that religion requires its members to adhere to the kosher dietary laws prescribed by the Hebrew scriptures. Pet. App. 4. The Virginia Department of Corrections has in place a program that provides kosher and other special dietary meals to inmates, known as the "common fare diet." *Ibid.* While local prison officials approved Madison's request to be provided access to that diet, petitioners overrode that decision on the grounds that (i) Madison could choose food from the prison's existing menus, (ii) they viewed Madison's religious beliefs as not sincerely held, and (iii) Madison has a history of disciplinary problems. *Ibid.*

Madison filed suit against petitioners under RLUIPA and the First Amendment. Pet. App. 4, 23. Petitioners moved to dismiss the RLUIPA claim on the ground that the statute exceeds Congress's authority under the Spending and Commerce Clauses and violates the Establishment Clause, the Tenth Amendment, and the separation-of-powers doctrine. *Id.* at 28. The United States intervened in the district court, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of RLUIPA. *Id.* at 5.

The district court granted petitioners' motion to dismiss on the grounds that RLUIPA's institutionalized-persons provisions violate the Establishment Clause. Pet. App. 23-56. The district court reasoned that, "[w]hile Congress could constitutionally legislate to raise the level of protection for all of the fundamental rights of prisoners, doing so only for the right to religious exercise when all fundamental rights are equally at risk in the prison system has the principal effect of raising religious rights to a position superior to that of all other rights held by prisoners." *Id.* at 44. In light of that ruling, the court did not separately address

petitioners' other constitutional objections to RLUIPA. The district court certified its ruling for interlocutory appeal, pursuant to 28 U.S.C. 1292(b), Pet. App. 55, and both Madison and the United States filed petitions for interlocutory review, *id.* at 58.

3. The court of appeals granted the petitions for interlocutory appeal, Pet. App. 57-58, and reversed, *id.* at 1-22. The court held that RLUIPA's institutionalized-persons provisions are a permissible accommodation of religious practices under the Establishment Clause. *Id.* at 10-17. More specifically, the court concluded that RLUIPA has the permissible "secular goal of exempting religious exercise from regulatory burdens in a neutral fashion." *Id.* at 12 (citing *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 335 (1987)).

The court also rejected the district court's conclusion that "Congress impermissibly advances religion when it acts to lift burdens on religious exercise yet fails to consider whether other rights are similarly threatened." Pet. App. 14. The court explained that the Establishment Clause's requirement of neutrality neither "require[s] the government to be oblivious to the burdens that state action may impose upon religious practice and belief," *id.* at 11, nor does it "mandate that when Congress relieves the burdens of regulation on one fundamental right, that it must similarly reduce government burdens on all other rights," *id.* at 15. "There is no requirement that legislative protections for fundamental rights march in lockstep," the court concluded. *Id.* at 14. Indeed, in the court's view, imposing "a requirement of symmetry of protection for fundamental liberties would not only conflict with all binding precedent," *id.* at 16, and "work a profound change in the Supreme Court's Establishment Clause

jurisprudence," *id.* at 17, but also would "place prison administrators and other public officials in the untenable position of calibrating burdens and remedies with the specter of judicial second-guessing at every turn," *id.* at 16. The court further held that RLUIPA "minimizes the likelihood of entanglement through its carefully crafted enforcement provisions." *Id.* at 17.

The court of appeals noted that petitioners had "recognized at argument the problematic nature of the trial court's rationale," Pet. App. 18, and had proffered "alternative points in support of affirmance," *ibid.*, which the court of appeals also rejected, *id.* at 18-22. With respect to petitioners' reliance on *Estate of Thornton* v. *Caldor*, 472 U.S. 703 (1985), the court explained that *Caldor* found unconstitutional "an unfunded mandate imposed on private employers to lift *privately*-imposed burdens on the religious exercise of employees." Pet. App. 19. RLUIPA is different, the court explained, because petitioners "ha[ve] voluntarily committed [themselves] to lifting *government*-imposed burdens on the religious exercise of publicly institutionalized persons in exchange for federal correctional funds." *Ibid.* Finally, in response to petitioners' argument that the State "retains the exclusive authority to regulate" in the area of religious accommodation, the court explained that, "[a]lthough couched in religious terms, this is really a variant of the Commonwealth's many federalism-based or residual power contentions, which we have left to the district court on remand." *Id.* at 22.

DISCUSSION

1. The government agrees with petitioners (Pet. 9-10) and respondent Madison (Br. 5) that this Court should grant review of the first question presented to

resolve a conflict in the circuits concerning whether RLUIPA's institutionalized-persons provisions violate the Establishment Clause. The Fourth Circuit held here (Pet. App. 8-21) that the religious accommodation obligation of RLUIPA's institutionalized-persons provisions are consistent with the Establishment Clause. That decision accords with rulings of the Seventh and Ninth Circuits. See *Charles* v. *Verhagen*, 348 F.3d 601, 610-611 (7th Cir. 2003); *Mayweathers* v. *Newland*, 314 F.3d 1062, 1068-1069 (9th Cir. 2002), cert. denied, 124 S. Ct. 66 (2003). The Sixth Circuit recently reached the opposite conclusion, in *Cutter* v. *Wilkinson*, 349 F.3d 257, 261-269 (2003), petition for cert. pending, No. 03-9877 (filed Apr. 19, 2004).[5]

That conflict in the circuits is mature and entrenched. Postponing review is not likely to contribute to the reasoned resolution of the question presented. The opposing court of appeals decisions have thoroughly aired the relevant legal issues and competing arguments pertaining to the Establishment Clause question. The decision below acknowledged and

---

[5] The Sixth Circuit's decision is also in substantial tension with numerous court of appeals decisions upholding the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb, against similar Establishment Clause challenges. See *In re Young*, 141 F.3d 854, 861-863 (8th Cir.), cert. denied, 525 U.S. 811 (1998); *Mockaitis* v. *Harcleroad*, 104 F.3d 1522, 1530 (9th Cir. 1997); *Sasnett* v. *Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996), vacated on other grounds, 521 U.S. 1114 (1997); *EEOC* v. *Catholic Univ.*, 83 F.3d 455, 470 (D.C. Cir. 1996); *Flores* v. *City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996), rev'd on other grounds, 521 U.S. 507 (1997). The Religious Freedom Restoration Act requires the federal government to afford the same level of statutory protection to federal inmates' religious exercise as RLUIPA requires of state and local governments, so those court of appeals' rulings speak squarely to the issue presented here.

rejected the Sixth Circuit's decision in *Cutter*, see Pet. App. 10, 14, and *Cutter* acknowledged and rejected the prior decisions of the Seventh and Ninth Circuits, see 349 F.3d at 261-262. Furthermore, on March 3, 2004, the Sixth Circuit denied Madison's and the United States' petitions for rehearing en banc, despite the Fourth Circuit's addition to the circuit conflict. There is thus no sound basis for concluding that the circuit conflict will resolve itself. The volume of cases in which the Establishment Clause issue has arisen demonstrates that the question presented is of recurring importance and that conflicting decisions are likely to proliferate in the courts of appeals.[6] In addition, an Act of Congress has been subjected to irreconcilable judicial rulings as to its constitutionality. The constitutionality of significant federal civil rights legislation is a matter of broad and enduring national importance that requires definitive resolution by this Court.[7]

Finally, this case, which represents the first petition for a writ of certiorari filed on the Establishment Clause question since the circuit conflict arose, presents an appropriate vehicle for resolution of the Establish-

---

[6] The same Establishment Clause question is currently pending before the Eleventh Circuit in *Benning* v. *Georgia*, Nos. 04-10979, 04-11044 (case is fully briefed and pending oral argument).

[7] While the case arises in an interlocutory posture, for which certiorari review is traditionally disfavored, see *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), that consideration has generally carried less force in cases presenting the question of Congress's power to enact the federal law at issue in the litigation, because resolution of that question rarely will be altered by further proceedings in the trial court. See, *e.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 512 (1997) (reviewing question of Congress's power to enact the Religious Freedom Restoration Act, which arose in the identical interlocutory posture).

ment Clause question. The United States has participated in the case, in defense of the constitutionality of RLUIPA, since the district court. The courts below were presented with and considered a broad spectrum of arguments pertaining to the Establishment Clause question, and both the district court and court of appeals accordingly issued thorough yet conflicting decisions that provide a constructive framework for the issue's consideration by this Court. The facts of the case are simple and straightforward, presenting a common, familiar, and fairly illustrative context in which to consider the basis for congressional legislation and to apply the constitutional analyses dictated by the Establishment Clause. Lastly, the posture in which the case arises allows this Court to control the scope of the constitutional issues presented for the Court's consideration by limiting the grant of certiorari to the Establishment Clause question presented, which is the only issue on which the courts of appeals are in conflict and which is ripe for this Court's review.[8]

---

[8] The later petition filed in the Sixth Circuit case, *Cutter, et al.* v. *Wilkinson, et al.*, No. 03-9877, provides a less optimal vehicle for this Court's review, due to the multiplicity of parties and factual claims presented in the three combined cases, and the complications in the alignment of all the different parties as petitioners and respondents that would arise were the Court to consolidate consideration of that case with the present petition. In addition, were the Court to grant that petition, in which RLUIPA was held to violate the Establishment Clause, the respondent state officials would be free to raise a host of distinct constitutional challenges as alternative grounds for affirmance. As explained in point 2, *infra*, such a development could require this Court to address a number of difficult, sensitive, and vitally important constitutional issues without the benefit of their consideration by the court of appeals in the instant case, in the *Cutter* case, or by many other courts of appeals. Accordingly, if this Court grants the instant petition, the

2. This Court should deny review of the second and third questions presented by the petition, which seek this Court's review, respectively, of whether RLUIPA reflects a proper exercise of Congress's Spending or Commerce Clause power, and whether RLUIPA may be enforced through actions brought under *Ex parte Young*, 209 U.S. 123 (1908).

First, none of those issues was addressed or decided by the courts below. The district court decided only petitioners' Establishment Clause challenge, and that is the only legal challenge that the court of appeals resolved on the parties' certified interlocutory appeal of the district court's partial judgment, pursuant to 28 U.S.C. 1292(b). The court of appeals remanded for the district court's consideration in the first instance of petitioners' other challenges to Madison's RLUIPA claim. Pet. App. 22 ("We do not address these issues in this interlocutory appeal because the district court has not yet had sufficient opportunity to consider them."); see *Pierce County* v. *Guillen*, 537 U.S. 129, 148 n.10 (2003) (declining to reach Tenth Amendment issue because it was not addressed below); *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (Court ordinarily does not decide issues not resolved below).

The Commerce Clause challenge is particularly ill-suited for this Court's review. Congress relied on its Commerce Clause power to enact RLUIPA's institutionalized-persons provisions only for those cases where the record establishes that "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. 2000cc-

---

United States will suggest that the *Cutter* case be held pending the Court's ruling in the case at hand.

1(b)(2). Madison, however, does not appear to be relying upon that portion of RLUIPA as a basis for relief in this litigation, at least at this juncture (Madison Br. 9), and the record in the case contains no factual predicate triggering that provision's operation. On the other hand, as the court of appeals found, the Virginia Department of Corrections received nearly $5 million in federal funds in 2002, Pet. App. 5, and the case thus has proceeded as one arising under RLUIPA's Spending Clause provision. 42 U.S.C. 2000cc-1(b)(1).

Second, no conflict in the circuits exists on the Spending Clause, Commerce Clause, or *Ex parte Young* questions presented. Indeed, no court of appeals has decided whether RLUIPA reflects a proper exercise of Congress's Commerce Clause power. And only the Ninth Circuit has discussed, and then in just a brief two-sentence holding, the availability of an *Ex parte Young* action to enforce RLUIPA. *Mayweathers*, 314 F.3d at 1069-1070.

Only two circuits—the Seventh and Ninth—have addressed whether RLUIPA reflects a proper exercise of Congress's Spending Clause power. Both courts properly sustained RLUIPA as appropriate legislation under that provision, correctly following this Court's decision in *South Dakota* v. *Dole*, 483 U.S. 203 (1987). See *Charles*, 348 F.3d at 606-610; *Mayweathers*, 314 F.3d at 1066-1067.[9] Judicial consideration of the Spending Clause question raised by petitioners has thus been quite sparse. In the absence of a circuit conflict or a holding declaring an Act of Congress

[9] Those courts treated the Spending Clause issue as antecedent and, having sustained RLUIPA on Spending Clause grounds, declined to address the Commerce Clause issue. That mode of analyzing the Spending and Commerce Clause claims further underscores the prematurity of petitioners' Commerce Clause challenge.

unconstitutional, no pressing need exists for this Court's intervention before the important questions of congressional power have been fully ventilated in the courts of appeals. Indeed, just eight months ago, this Court denied a petition for a writ of certiorari that sought review of the identical Spending and Commerce Clause challenges to RLUIPA. See *Alameida* v. *Mayweathers*, 124 S. Ct. 66 (2003). Petitioners identify no intervening development that warrants a different outcome here.

Review of the Spending Clause question at this stage would be inappropriate for yet another reason. The lower courts have not yet been afforded the opportunity to consider the question in light of this Court's recent decision analyzing Congress's Spending Clause power in *Sabri* v. *United States*, No. 03-44, 2004 WL 1085233 (May 17, 2004). That decision's discussion of Congress's authority to ensure that federal funds are not put to uses that Congress considers inappropriate and its acknowledgment of the fungibility of money, *id.* at **4-**5, bear directly on Congress's authority to enact RLUIPA to ensure that federal funds are not used to impose or to facilitate the imposition of unwarranted and substantial burdens on the free exercise of religion.

CONCLUSION

With respect to the first question presented—whether the institutionalized-persons provisions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc-1, are valid under the Establishment Clause of the First Amendment—the petition for a writ of certiorari should be granted. With respect to the second and third questions presented, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
MARK B. STERN
MICHAEL S. RAAB
CATHERINE Y. HANCOCK
Attorneys

MAY 2004